Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

DEMETRIUS LAMBERT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES A DISTRICT COURT, AFTER DELIBERATIONS HAVE COMMENCED AND AFTER ALTERNATE JURORS HAVE BEEN DISMISSED, VIOLATE DUE PROCESS AND DEFENDANT'S RIGHT TO BE PRESENT, WHEN THE COURT DISCHARGES A JUROR ON THE BASIS OF EX PARTE, UNSWORN, UNRECORDED/UNREPORTED PHONE CONVERSATIONS WITH THE JUROR - WITH CONSENT ONLY FOR THE COURT TO PHONE THE JUROR TO DETERMINE THE PROBLEM, AND WITHOUT CONSENT FOR THE CONTACT TO BE UNRECORDED/UNREPORTED, AND WITHOUT CONSENT FOR THE COURT TO ACT WITHOUT FURTHER INPUT FROM DEFENDANT OR HIS COUNSEL - THEREBY FORCING DEFENDANT TO HAVE HIS FATE DECIDED BY 11 JURORS?

2. WHERE OTHER-CRIMES "BAD MAN" EVIDENCE WAS SUBSTANTIAL AND VERY PREJUDICIAL, WAS DEFENDANT DENIED A FAIR TRIAL, IN VIOLATION OF 5th AMENDMENT DUE

PROCESS, BECAUSE THE JURY WAS NEVER INSTRUCTED ON THE LIMITED USE OF THIS EVIDENCE - NEITHER AFTER FINAL ARGUMENTS, NOR WHEN THE EVIDENCE WAS ADMITTED - THEREBY PERMITTING THE JURY TO CONSIDER THIS OTHER-CRIMES, BAD MAN EVIDENCE WITHOUT ANY JUDICIAL GUIDANCE?

PARTIES INVOLVED

Petitioner, Demetrius Lambert, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and the appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the United States District Court for the Northern District of Illinois, Eastern Division, and the appellee in the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Demetrius Lambert (defendant) prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the 7th Circuit, affirming the judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division.

Opinion and Order Below

The Opinion of the 7th Circuit, No. 97-2834, filed September 8, 1999 (App. A; App. 1-28), is reported, United States v. Neeley, et al., 189 F.3d 670 (7 Cir. 1999). On October 20, 1999, the 7th Circuit denied Lambert's timely-filed[1] petition for rehearing and rehearing en banc. (App. B; App. 29)

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[1] Defendant's Petition for rehearing/rehearing en banc was filed within the extended time allowed by order of the 7th Circuit.

Jurisdictional Statement

On September 8, 1999, the 7th Circuit filed its Opinion. (App. A; App. 1-28) Petition for rehearing (timely-filed within the extended time allowed) was denied on October 20, 1999. (App. B; App. 29) This Petition is timely filed within 90 days.

Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

U.S. Const., Amend. V, provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

U.S. Const., Amend. VI, provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

STATEMENT OF THE CASE

Jurisdiction in the court of first instance is based on 18 U.S.C. § 3231, which provides that the district courts of the United States shall have original jurisdiction of all offenses against the laws of the United States. This cause arose as a prosecution of defendant, alleging offenses against the laws of the United States.

Defendant was convicted of conspiring to possess with intent to distribute cocaine (21 U.S.C. 846), conspiring to defraud the United States (18 U.S.C. 371), and conspiring to commit money laundering offenses (18 U.S.C. 1956(h)), and was sentenced to 360 months.

STATEMENT OF FACTS

Defendant was charged in 3 conspiracy counts of an 18-count indictment naming

a total of 21 defendants. (R 1) This was a five-week trial. The government presented evidence from which the 11-person jury concluded that defendant was guilty as charged.

Facts re Issue 1 (11-person jury)

Pages of the Transcript containing all pertinent facts re this issue (Tr. 3266-3301), are attached as App. C. (App. 31-93)

The jury was instructed on Friday afternoon, Dec. 6, 1996 (Tr. 3223-53), the 2 remaining alternates were discharged (Tr. 3249-53), and the 12 remaining jurors were thereupon sent to deliberate at 1:20 p.m. (Tr. 3263)

The court, before sending the jury to deliberate, stated in colloquy with counsel that at 4:30 that afternoon, the jurors were to be told they could go

home and return at 9:30 the following Monday morning. (Tr. 3258-59, 3262)

On the Monday morning following that Friday afternoon, the court reported to defense counsel that juror Mary Adam might not be able to continue to serve on the jury. (Tr. 3267-68) The court related that a message was received on Sunday, Dec. 8, 1996, on the court's telephone answering machine in chambers, from juror Mary Adam, indicating a possible problem with her continuing to serve on the jury. (Tr. Tr. 3267-68) She was unable to attend court on Monday, Dec. 9, 1996, because she had to attend a custody hearing concerning her grandchildren. (Tr. 3289)

Discussions with the defense demonstrated all defendants objected to continuing with 11 jurors if Mary Adam

were to be discharged; defendants sought to have the court retain at least one of alternates whom the court had discharged the previous Friday. (See Tr. 3268-86, 3289-3302.) Counsel for defendant Lambert expressly so suggested. (Tr. 3280-81) The prosecution refused to agree to recalling an alternate in place of a discharged juror. (Tr. 3289; see Tr. 3301-02)

Eventually the court had two telephone conversations with Mary Adam, which were not recorded or reported, culminating in the court's discharging her over the phone, without any input from the defense. The first of these conversations was on Monday, Dec. 9, 1996, prior to a scheduled 1 p.m. Kane County hearing involving custody of her grandchildren (Tr. 3272-73); the second,

on Monday, Dec. 9, 1996, about 4:05 p.m., after the said hearing, reporting she had been granted temporary custody of her daughter's three young children - ages 6, 3, and 6 months, and that another hearing date had been set for Dec. 23, 2 weeks off. (Tr. 3299) While defendants had agreed to have the court make further inquiry of Mary Adam by phone (Tr. 3271), there was no agreement that this telephonic contact not be recorded or reported, or that the court could discharge her without consultation with defendant or his counsel. (Tr. 3271) The following occurred:

> "THE COURT: Well, I did not call her. Do I have your permission to call her and at least get a better handle on the situation?
>
> MS. COUGHLIN: Yes.
>
> MR. LOPEZ: Yes, Judge.
>
> MR. BAILEY: *[Lambert's trial*

> *defense counsel]* That sounds intelligent to me, Judge, to find out if it is definite that she will be available in the morning. Fine.
>
> THE COURT: All right. That is probably the better course of action.
>
> I do not, frankly, see -- I have given the others enough time to get here and I do not see -- **I have <u>at least</u> your permission to call her, everyone who is here?**
>
> MR. BAILEY: Yes.
>
> THE COURT: I think that is the prudent thing to do. Let me call her. Stay here and I will report back on the subject of my discussions with her. Okay?
>
> MS. COUGHLIN: That is fine." (Tr. 3271; App. C, App. 40-41) (Emphases added.)

Absent the consent of the prosecution (see Tr. 3289; Tr. 3301-02), the court refused to seek to recall either discharged alternate on defense request, but directed the jury to "commence its deliberations" (Tr. 3302) with a jury of 11 persons, over defense objections, and

denied defendant's motion for mistrial. (Tr. 3302)

Facts re Issue 2 (Lack of Any Limiting Instruction re Other Crimes Evidence)

In making its case, the prosecution relied on the testimony of nine (9) guilty-pleading persons (most, co-defendants), all with plea agreements whereby they were to receive substantial benefits with respect to the dispositions of their pending charges as a result of their testimony in this case. A part of the plea agreement of each of these witnesses was to testify truthfully in this case, in exchange for which the government would make certain recommendations.

The prosecution also relied on evidence that one of those witnesses, Toby Hill, had been shot and put in a

car trunk in an apparent kidnaping, though this activity was not connected to defendant or to any of the co-defendants. (Tr. 1434-41)[2] The court allowed the evidence as indicative of the "flavor" of the drug business. (Tr. 1437) Also admitted was evidence of two other separate shootings (Tr. 103; 370-71; 377; 436) - neither related to the charges of the case on trial.

The prosecution further relied on substantial other-crimes/bad act evidence regarding possession of weapons (Tr. 458-62, 513-20), and the court failed to instruct the jury as to the limited purpose for which such evidence could be considered - either at the time

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[2] A major co-conspirator, Nate Hill, was a fugitive at the time of trial. The evidence does not purport to link him to this activity either.

of its admission, or in the final charge to the jury. (See jury charge, Tr. 3223-52.)

REASONS FOR GRANTING CERTIORARI

1. A DISTRICT COURT, AFTER DELIBERATIONS HAVE COMMENCED AND AFTER ALTERNATE JURORS HAVE BEEN DISMISSED, VIOLATES DUE PROCESS AND DEFENDANT'S RIGHT TO BE PRESENT, WHEN THE COURT DISCHARGES A JUROR ON THE BASIS OF EX PARTE, UNSWORN, UNRECORDED/UNREPORTED PHONE CONVERSATIONS WITH THE JUROR - WITH CONSENT ONLY FOR THE COURT TO PHONE THE JUROR TO DETERMINE THE PROBLEM, AND WITHOUT CONSENT FOR THE CONTACT TO BE UNRECORDED/UNREPORTED, AND WITHOUT CONSENT FOR THE COURT TO ACT WITHOUT FURTHER INPUT FROM DEFENDANT OR HIS COUNSEL - THEREBY FORCING DEFENDANT TO HAVE HIS FATE DECIDED BY 11 JURORS.

The District Court's action in discharging a juror in such ex parte manner, violates due process and defendant's right to be present at all crucial judicial procedures.

The constitutional right to be present at every meaningful stage of trial - protected by due process, Snyder

v. Massachusetts, 291 U.S. 97, 105-06, 78 L.Ed. 674, 678 (1934), and "rooted to a large extent in the Confrontation Clause of the Sixth Amendment," United States v. Gagnon, 470 U.S. 522, 526, 84 L.Ed.2d 486, 490 (1985), and as codified by F.R.Cr.P. 43(a) - extends to all contacts between the court and a deliberating jury. Rogers v. United States, 422 U.S. 35, 45 L.Ed.2d 1 (1975); United States v. Neff, 10 F.3d 1321, 1323-24 (7 Cir. 1993).

The court's communications with Juror Adam, were communications with a still-impaneled member of a deliberating jury.

This is a crucial and important issue for this Court to decide - because at issue is whether due process requires recording or transcription of phone conversations between judge and jurors,

and whether courts can make an ex parte decision about discharge of jurors - an issue that often may arise, and for which this Court must set a standard for the district courts.

Defendant's right to a jury of 12 persons, although not constitutionally mandated, Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446 (1970), is an expected part of the American Justice system. Ibid. The act of a Judge in communicating with members of a jury (whether to reduce their number, or for other reasons) is regulated by procedural due process. Rogers v. United States, 422 U.S. 35, 45 L.Ed.2d 1 (1975). Part of the requisite procedural due process is the ability to memorialize what occurred between judge and jury - to assure that higher

tribunals can evaluate what occurred. It is required that the conversation be recorded, and that no judicial action be taken without input of defendant's counsel. Rogers, supra; see also United States v. Neff, 10 F.3d 1321, 1324-25 (7 Cir. 1993), where the Court of Appeals reversed due to an unrecorded contact between the district court and a deliberating jury, stating:

> "A record of these proceedings, whatever they were, is essential. If the district court had conducted its communications [with the jury] in open court as required by *Rogers*, then, pursuant to the Court Reporter's Act, 28 U.S.C. § 753(b), the district court would have been required to have a court reporter present at the proceedings." Id. at 1324.

Here, the Court of Appeals held that defendant's due process rights were complied with - because counsel for defendant had agreed that the court

could contact the jury to see what the problems are. (App. A, App. 14-15; 189 F.3d at 679)

The 7th Circuit enlarged consent by the defense for the court to obtain information, into consent for the court to act without opportunity for defense input, and consent to allow discussions between judge and juror to be "unrecorded." The Opinion is wrong, because defendant and counsel only agreed to the court's request to INITIALLY call juror Adam. (Tr. 3271; App. C, App. 40-41; see quotation at pp. 7-8, supra.) The court's exact language to defendant and counsel, clarifying the scope of the defense consent, was:

> "THE COURT: Well, I did not call her. Do I have your **permission to call her and at least get a better handle on the situation?**
>
> MS. COUGHLIN: Yes.

> MR. LOPEZ: Yes, Judge.
>
> MR. BAILEY: *[Lambert's trial defense counsel]* That sounds intelligent to me, Judge, to find out if it is definite that she will be available in the morning. Fine.
>
> THE COURT: All right. That is probably the better course of action.
>
> I do not, frankly, see -- I have given the others enough time to get here and I do not see -- I **have <u>at least</u> your permission to call her, everyone who is here?**
>
> MR. BAILEY: Yes.
>
> THE COURT: I think that is the prudent thing to do. Let me call her. Stay here and I will report back on the subject of my discussions with her. Okay?
>
> MS. COUGHLIN: That is fine." (Tr. 3271; App. C, App. 40-41) (also at App. A, App. 10; 189 F.3d at 677) (Emphases added.)

This agreement was a LIMITED CONSENT for the court to call her. It was NEVER consent to unrecorded/unreported FURTHER phone calls. It was NEVER consent for the court to proceed, without a SWORN

statement by the juror; without the juror being questioned by counsel for defendant directly, or through the court with questions submitted by counsel as to her assertions as to why she could not continue to serve; and without the court advising counsel and defendant of the juror's assertions of the problem, so they could present their positions to the court, for the court to consider in determining what to do.

Consent must be knowingly and voluntarily given, Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461 (1938), and hence, limited consent is not consent to broader, greater intrusions of defendant's rights. Florida v. Jimeno, 500 U.S. 248, 251, 114 L.Ed.2d 297, 302-03 (1991). See, e.g., United States v. Elliott, 107 F.3d 810, 814-16 (10 Cir.

1997), applying Florida v. Jimeno, supra; accord, per 7th Circuit, McGann v. Northeast Illinois Reg. Commuter R.R., 8 F.3d 1174, 1180 (7 Cir. 1993), quoting Judge Swygert in United States v. Dichiarinte, 445 F.2d 126, 129-30 n.3 (7 Cir. 1971).

In Florida v. Jimeno, supra, a 4th Amendment case, this Court stated:

> "The standard for measuring the scope of a suspect's consent ... is that of 'objective' reasonableness - what would the typical reasonable person understand by the exchange between the officer and the suspect?" 500 U.S. at 251, 114 L.Ed.2d at 302.

Here, the court's statement: "I have at least your permission to call her..." (Tr. 3271; see pp. 7-8 & 15-16, supra; App. A, App. 10; App. C, App. 41; 189 F.3d at 677) - demonstrates that under an objective standard, as per Jimeno, there was consent by the defense only

for the court to obtain facts, especially where the rule of law as per United States v. Rogers, 422 U.S. 35, 45 L.Ed.2d 1 (1975), required (a) recording and (b) input from defendant and counsel.

This Court must grant certiorari to decide whether a limited consent, as here, can be used by a district court to justify (a) holding unrecorded phone conversations between judge and juror; and to justify (b) ex parte decision, providing the defense with no feed back as to new facts, and no opportunity to suggest alternative action.

2. WHERE OTHER-CRIMES "BAD MAN" EVIDENCE WAS SUBSTANTIAL AND VERY PREJUDICIAL, DEFENDANT WAS DENIED A FAIR TRIAL, IN VIOLATION OF 5th AMENDMENT DUE PROCESS, BECAUSE THE JURY WAS NEVER INSTRUCTED ON THE LIMITED USE OF THIS EVIDENCE - NEITHER AFTER FINAL ARGUMENTS, NOR WHEN THE EVIDENCE WAS ADMITTED - THEREBY PERMITTING THE JURY TO CONSIDER THIS OTHER-CRIMES, BAD MAN EVIDENCE WITHOUT ANY JUDICIAL GUIDANCE.

Due process requires that the limiting instruction given to the jury on how to consider other crimes ("bad man") evidence, be given, at the very moment that such evidence is presented to the jury, instead of only providing such a limiting instruction at the end of all evidence.[3] Here, no limiting instruction re how to consider the other

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[3] This argument is most compelling here, where the evidence of guilt is essentially "bad man" evidence, and testimony of informers, whose testimony must be considered with great care and caution. On Lee v. United States, 343 U.S. 747, 757, 96 L.Ed. 1270, 1277 (1952).

crimes/bad man evidence, was ever given.

Evidence of other crimes is highly prejudicial,[4] and its improper admission may be so prejudicial as to deny due process. Michelson v. United States, 335 U.S. 469, 475-76, 93 L.Ed. 168, 173-74 (1948); Old Chief v. United States, 519 U.S. 172, 136 L.Ed.2d 574 (1997); Henry v. Estelle, 993 F.2d 1423 (9 Cir. 1993); McKinney v. Rees, 993 F.2d 1378 (9 Cir. 1993); I WIGMORE, EVIDENCE § 57 (3d ed. 1940). It is very prejudicial because it affects how the jury evaluates evidence. Crotts v. Smith, 73 F.3d 861 (9 Cir.

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[4] "The deep tendency of human nature to punish, not because [the defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury." I WIGMORE, EVIDENCE § 57 (3d ed. 1940).

1996). The jury may choose to convict because they believe the defendant is a bad man. Michelson; Old Chief; United States v. Copelin, 996 F.2d 379 (D.C. Cir. 1993). Therefore, such evidence is admissible, only if joined by a limiting instruction that is designed to regulate [limit] the jury's use of such evidence - and not permit the jury to convict defendant because they think he is a "bad man."[5] United States v. Johnson, 102 F.3d 214, 222 (6 Cir. 1996) (failure

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[5] Although defendant specifically and separately argued on appeal that he was denied a fair trial because the court failed to give the jury appropriate and timely limiting instructions as to the other-crimes evidence (Def. Br. Point II(B), pp. 33, 45-47), the 7th Circuit addressed the issue of no limiting instructions only in terms of defendant's separate argument that he received ineffective assistance of counsel because counsel did not request limiting instructions. (App. A, App. 23-24; 189 F.3d at 684)

to instruct re limited use of bad man evidence denied a fair trial); see Estelle v. McGuire, 502 U.S. 62, 116 L.Ed.2d 385 (1991), holding by implication that due process would be violated if the limiting instruction did permit the "bad man inference."

The common practice has been to provide such a limiting instruction with all other instructions, only at the end of trial. Because of the human nature of jurors, and how bad man evidence affects them,[6] providing a limiting instruction only at the end of the evidence after

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[6] Striking improperly admitted bad man evidence may not cure the error, because of the highly prejudicial nature of such evidence. United States v. Jenkins, 7 F.3d 803 (8 Cir. 1993) (reversal for improper bad man evidence, despite attempted curative measures); Dunn v. United States, 307 F.2d 883, 886 (5 Cir. 1962) ("'[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it'.")

final arguments is insufficient to insure that the jury is not (when they consider prosecution testimony) tainted by their belief that defendant is a bad man. If no instruction is given when the bad man evidence is admitted, the jury will consider it as bad man evidence.

In Copelin, the Court of Appeals, adopting Judge Bazelon's language from United States v. McClain, 440 F.2d 241, 246 (D.C. Cir. 1971), held:

> "[W]henever evidence is admitted only for a limited purpose, it is plain error...to omit an **immediate** cautioning instruction. **The danger of prejudicial effect from such evidence is so great that only an IMMEDIATE and CONTEMPORANEOUS instruction can be considered sufficient to protect defendants.**" Copelin, 996 F.2d at 384 (Emph. added), citing Jones v. United States, 385 F.2d 296 (D.C. Cir. 1967); United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970).

To insure that jurors only apply the bad man evidence for the limited purpose for

which it was admitted, instead of the jurors accepting the prosecution testimony "hook, line and sinker" because they believe defendant is an evil man, the jury must receive the limiting instruction at the time the bad man evidence is first presented, whether in opening argument or in prosecution testimony. Copelin, 996 F.2d at 384.

There is no policy reason why the instruction should not be given at the earliest opportunity.

Therefore, just as due process requires exclusion of immaterial, irrelevant "bad man" evidence - Michelson, Old Chief, Henry v. Estelle, McKinney v. Rees, Crotts v. Smith, all, supra p. 21 - and requires exclusion of other crime evidence where prejudicial effect outweighs probative value, Old

Chief, and requires limiting instruction, where the jury is permitted to consider evidence for a limited purpose, United States v. Johnson, supra, 102 F.3d at 222; Estelle v. McGuire, supra, so, too, due process requires that such a limiting instruction must be given when the other-crimes evidence is admitted.

Certiorari should be granted because other crimes evidence is presented in a good percentage of criminal cases, both State and federal, and hence the problem of when an instruction should be given is a serious, national problem, requiring this Court to hold that due process requires that the appropriate other-crimes limiting instruction must be given when the evidence is first referred to in argument and when the

evidence is admitted before the jury.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

FREDERICK F. COHN
Attorney for Petitioner